<u>Private Admonition and Two-Year Probation–Board Case No. 2, 2002; Delaware Supreme Court Case No. 529, 2002.</u> Date of Sanction: October 7, 2002. By order dated October 7, 2002, the Delaware Supreme Court approved a report submitted by a panel of the Board on Professional Responsibility ("Board"). The Board's report had concluded, in accordance with the stipulation entered into by the Office of Disciplinary Counsel ("ODC") and the Respondent, that the Respondent had violated the Delaware Lawyers' Rules of Professional Conduct ("Rules"), and recommended that the Court impose the sanction of a private admonition and two-year private probation, with specified terms and conditions. The disciplinary matter was opened based upon a report provided to the ODC in December 2001 by Martin Zukoff, CPA, an Auditor for the Lawyers' Fund for Client Protection ("LFCP"), who performed a random audit of the Respondent's compliance with his lawyer financial recordkeeping and tax obligations. The audit revealed no deficiencies in the Respondent's compliance with his lawyer financial record keeping obligations, including the handling of and accounting for client escrow funds. However, the audit reflected that the Respondent had failed to pay law practice payroll taxes in a timely manner from early 1994 through the time of the audit (i.e., over seven years). Almost all of the Respondent's payroll tax returns were <u>filed</u> in a timely manner. The only exceptions were the payroll tax returns for employee Delaware state income tax withholding for all four quarters of 1997. However, most of the payroll tax obligations for the 31 quarterly periods from 1994 through the third quarter of 2001 were not paid by the Respondent in a timely manner. Significant penalties and interest charges were incurred due to these late payments. The Respondent was not aware of the failures regarding the 1997 Delaware state income tax withholding until Mr. Zukoff conducted his audit.

With respect to the Respondent's personal income taxes for 1997, in December 1998 the Respondent had reached an installment agreement with the Internal Revenue Service ("IRS") for a monthly payment schedule to pay the unpaid balance due showing on his 1997 return, which return had been filed in a timely manner. With respect to the Respondent's personal income taxes for 1998, the Respondent was making monthly installment payments toward the unpaid balance due showing on his 1998 return, which return had been filed in a timely manner.

In December 1999, the Respondent received a notice of deficiency from the IRS regarding the unpaid balance due showing on his 1998 return. In January and February 2000, the Respondent failed to make the payments required under the installment agreement for the 1997 income taxes. The Respondent contacted the IRS in January 2000 prior to the filing of the Certificate of Compliance and reported that the agreed upon installment payment could not be paid. In February 2000, he advised the IRS that he was attempting to borrow money to satisfy his agreement. In March 2000, the IRS suggested that he send in what he could, and the Respondent sent a payment of $500. Subsequent to that contact, the Respondent again contacted the IRS in May 2000, requesting a new installment agreement. The IRS thereupon reduced the monthly payment and expanded the arrangement to include both 1997 and 1998 income taxes. The Respondent subsequently made all installment payments required by the agreement in a timely manner.

The Respondent admitted the following violations of the Rules:

(1) By failing to pay various federal, state and city payroll taxes owed for his law practice in a timely manner during the period extending from January 1994 through November 2001, the

Respondent violated Rule 1.15(b), which states that "a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property."

(2) By failing to file and/or pay his 1997 employee Delaware income withholding taxes until December 2001, and by making consistently delinquent payments in connection with many other law practice payroll tax obligations during the period from January 1994 through November 2001, the Respondent violated Rule 8.4(d), which provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

(3) By filing with the Supreme Court Certificates of Compliance in 1995, 1996, 1997, 1998, 1999, 2000, and 2001, with responses which were incorrect in light of the Respondent's delinquent law practice payroll tax obligations, the Respondent violated Rule 8.4(d). Moreover, the Respondent's Certificate of Compliance in 2000 was in violation of Rule 8.4(d) for the further reason that it contained a response which was incorrect in light of the Respondent's personal income tax obligations which were delinquent and/or unresolved at that time. Specifically, in light of the Respondent's failure to make the January 2000 installment payment on his 1997 federal income taxes, and the delinquent balance due showing on his personal income tax return for 1998 which had not yet been paid or included in a payment plan acceptable to the IRS, the Respondent should not have certified that "[a]ll federal, state and local payroll, gross receipts and income taxes have been filed and paid on a timely basis."

In recommending the imposition of private rather than public sanctions, the Board emphasized that the record reflected that the Respondent had acted negligently, rather than knowingly or intentionally, with respect to the misconduct at issue. The Board also considered the aggravating and mitigating factors existing in this matter. In aggravation, the Board considered (1) the pattern of Rules violations over an extended period of time, involving the Respondent's payroll tax and Certificate of Compliance obligations; and (2) the Respondent's substantial experience in the practice of law. In mitigation, the Board considered: (1) the absence of any prior disciplinary record; (2) the absence of a dishonest or selfish motive; (3) the significant personal problems experienced by the Respondent beginning in 1994, including a series of serious health problems and the illnesses and death of family members, as well as substantial economic hardships which hindered his ability to meet his tax obligations by the times required by law; (4) the timely good faith efforts to rectify the consequences of the Respondent's misconduct; (5) the Respondent's full cooperation with the ODC and in the proceedings before the Board; (6) the Respondent demonstrated remorse and recognized the wrongfulness of his conduct; (7) the Respondent's character and reputation in the Bar, including his record of public service.

The two-year private probation imposed by the Court requires (1) quarterly reporting to the ODC by a licensed certified public accountant as to the Respondent's payroll tax compliance; (2) cooperation with the tax authorities regarding payroll and income tax obligations, and quarterly reporting from the Respondent to the ODC as to the Respondent's income tax compliance, including but not limited to the payment of income taxes under installment agreements with the tax authorities; (2) full and prompt cooperation with the ODC in its efforts to monitor compliance with his probation, including but not limited to cooperation with any audit performed by the LFCP at the request of the

ODC. The sanction was also conditioned upon the Respondent's payment of ODC and LFCP costs.